Tuscaloosa Quality Foods, Inc. *and* International Union, United Mine Workers of America. Case 10–CA–27193

August 18, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On July 20, 1994, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tuscaloosa Quality Foods, Inc., Tuscaloosa, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or more stringently enforce our rules so as to require employees to debone 15 boxes of meat daily or derive 56.5 percent of meat from the contents of these boxes.

WE WILL NOT promulgate and enforce a rule of absenteeism more stringent than our prior rule of allowing a reasonable number of absences coupled with a requirement that the employee call in prior to the scheduled worktime.

WE WILL NOT apply a formula for calculating our employees' vacation pay so as to reduce that pay.

WE WILL NOT discourage membership in International Union, United Mine Workers of America, or any other labor organization, by discharging or otherwise discriminating against our employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rules set forth above.

WE WILL offer reinstatement to Carl Fulgham and Dorothy Thomas and make them whole, with interest, for any loss of earnings they may have suffered because of our unlawful discharge of them.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that in *Hyatt Regency Memphis*, 296 NLRB 259 (1989), enfd. 939 F.2d 361 (6th Cir. 1991), the Board found that the employer violated the Act by applying more stringent and discriminatory rules in response to the employees' act of selecting the union as their representative rather than, as the judge inadvertently states, engaging in a strike.

The Respondent argues that its changes in productivity and vacation pay policies were made before the strike and certification of the Union and thus could not have been in retaliation for concerted activity and that, in any event, the charges are barred by Sec. 10(b). We find no merit in these arguments. It is clear that the new productivity requirements were announced for the first time in June 1993, which was after the strike and within 6 months of the charge. Although the Respondent contends that the requirements were formulated before the strike, the evidence does not establish that this was so. In addition, even assuming that the Respondent formulated the productivity requirements after the strike but before June, the charge was timely filed because notice and implementation of the requirements occurred in June and thus within the Sec. 10(b) period. See *Chinese American Planning Council*, 307 NLRB 410 (1992). With regard to vacation pay, we note that employees testified that prior to the strike they received 40 hours of pay for 1 week's vacation. No other means of calculating vacation time was announced or conveyed to the employees until after the strike and no earlier than June 1, 1993. Thereafter, employees received less vacation pay and there is no evidence in the record that vacation pay had previously been based on hours worked.

WE WILL notify them that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

WE WILL reimburse employees, with interest, for any vacation pay we have unlawfully withheld from them.

TUSCALOOSA QUALITY FOODS, INC.

Edward A. Smith, Esq., for the General Counsel.
Harry L. Hopkins, Esq. (Lange, Simpson, Robinson & Somerville), of Birmingham, Alabama, for the Respondent.
John L. Quinn, Esq. (Longshore, Nakamura & Quinn), of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on November 29, 1993,[1] by International Union, United Mine Workers of America (the Union), and complaint issued on February 28, 1994. It alleges that Tuscaloosa Quality Foods, Inc. (Respondent or the Company), on about June 6, 1993, imposed new rules on its employees, including changing their production requirements, their rules and penalties for absence, tardiness, and failure to achieve production goals, and the method of determining the vacation pay—all in retaliation for their participation in protected concerted and union activities. In addition, the complaint alleges that Respondent discharged employee Carl Fulgham on August 25 and employee Dorothy Thomas on September 17, for the same reason. The complaint alleges that Respondent thereby violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

A hearing on these matters took place before me on May 2, 1994, in Birmingham, Alabama. Thereafter, the General Counsel and Respondent filed briefs. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is an Alabama corporation, with an office and place of business in Tuscaloosa, Alabama, where it is engaged in the business of processing chickens. During the calendar year preceding issuance of the complaint, a representative period, the Company sold and shipped goods valued in excess of $50,000 from its Tuscaloosa, Alabama facilities directly to customers located outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Strike, the Representation Petition, and the Election*

On May 11, certain of Respondent's employees engaged in a strike. The exact number is not indicated in the transcript. A representation petition filed by the Union 6 days later however, claims that the Company had 175 employees, and a tally of ballots at a Board election lists 191 eligible voters.[2] General Manager Lonnie Polk testified that all the ''deboners''[3] walked out, but that 50 to 60 other employees remained at work. I conclude that over 100 employees went out on strike on May 11. Current employee Sheila Watkins testified that the reason was the fact that the current employees' hours of work were too long. The walkout lasted about a week.

The petition was filed on May 17,[4] claiming representation of Respondent's production and maintenance employees, and the election was held on July 8. Out of the total of 191 eligible voters, 151 cast votes for the Union, while 3 voters opposed it.[5] The Board certified the Union as the collective-bargaining representative of the indicated employees on July 16.[6]

B. *The Alleged Changes in Rules*

1. The production rules

a. *Summary of the evidence*

There are two factual issues: the production requirements and the required percentage of yield. These rules pertained to the deboners. Their function was to take a box of meat and remove the meat from the bones. The production requirement related to the number of boxes which each deboner was required to complete daily. The yield requirement concerned the percentage of meat which the deboner obtained from each box.

Sheila Watkins, a current deboner who was hired in May 1990, testified that her supervisor told her when she was hired that she had to complete 10 boxes a day to keep her job. The supervisor said nothing about yield.

The stipulation of the parties and Watkins' testimony indicate that, in about January 1993, the employees were required to sign a document that they would debone 12 boxes daily, but that nothing was said about yield. This stipulation is partially contradicted by the agreement which states that employees had to debone 15 boxes daily after a training period. However, nothing was said about yield.[7] Watkins testi-

[1] Respondent advances a 10(b) defense and denies that the charge was filed on November 29, 1993. I find that it was filed on that date, based on G.C. Exh. 1(a).

The Board's letter notifying Respondent of the charge is dated November 30, 1993 (G.C. Exh. 1(b)). There is no return receipt attached to this letter. Respondent admits that a copy of the charge was mailed to it on November 30, 1993. (G.C. Exh. 1 (e).) Although it also contends that the charge was filed on November 30, 1993, I have concluded that it was filed on November 29, 1993.

All dates are in 1993 unless otherwise stated.

[2] G.C. Exhs. 4, 5.
[3] Employees who removed meat from bones.
[4] G.C. Exh. 4.
[5] G.C. Exh. 5.
[6] G.C. Exh. 6.
[7] G.C. Exh 14.

fied that nobody was told they would be fired for not making production or yield, and, in fact, that nobody was fired when this rule was in effect. Watkins was corroborated by Mattie Walker, the leader of the union movement, who resigned on July 15.

Watkins and Walker were also corroborated by Claudia Taylor, a former deboner and current supervisor, who was called as a witness by Respondent. Although Taylor testified that a yield requirement was announced in early 1993, she agreed that an employee who did not meet the requirement was not fired, but, rather, was paid $5 hourly, not the production rate. This practice was in effect at the time of the hearing.

There are several employee status reports in evidence, stating that some employees quit, or were ''terminated'' (as checked in the appropriate box on the form) for failure to meet ''production or yield'' requirements. These reports were signed by various supervisors.[8] None of them testified, and Plant Manager Lonnie Polk stated that he could not recall the circumstances in any of the cases.

Respondent introduced three reports of alleged warnings for failure to meet a yield requirement. Two of these reports were assertedly signed by a supervisor who did not testify. One of them was identified at the hearing by Claudia Taylor, a supervisor.[9]

Prior to 1993, the deboners removed the meat by hand. In December 1992, the Company instituted a new system utilizing a device called a ''cone,'' which removed the meat semimechanically. Employees were trained to use this device.

Watkins testified that Plant Manager Polk held a meeting of deboners in June. He then said, for the first time, that they had to produce 56.5 percent of meat from the boxes they deboned. If they did not, they would be fired. Polk also stated that the deboners would be fired if they did not complete 15 boxes daily.

Employee Leader Mattie Walker testified that Polk held separate meetings for deboners and for support employees. Although Walker was a support employee and did not attend the meeting of deboners, she stated her understanding that it was at that meeting that Polk set forth the new production and yield requirements.

According to Walker, Polk held a earlier meeting of the support personnel on May 19. Asked whether Polk stated the new yield requirement at the meeting, Walker replied, ''No, no, no'' and pointed out the separate deboner meeting. During the May 19 meeting, the employees asserted grievances about working long hours and not being able to go to the doctor or leave when they were sick. Walker denied that production and yield were discussed, or complaints about some workers being faster than others and being delayed on going home. Nor was there any discussion of changing the line quota to an individual quota.

Walker acknowledged that between the time of the walkout and the time that Walker resigned (July 15), the Company did make some changes. The employees considered these changes to be in retaliation for their concerted activities.

Plant Manager Polk, on the other hand, testified that he never made a change in the yield requirement. Polk contended that the only change he made in the production requirement was in response to a complaint from some employees that slower workers on the line were causing the whole line to work longer hours. Accordingly, Polk asserted, he changed the production quota to an individual rather than a line requirement. This was done about May 18 or 19, after the walkout. Prior to this, Polk argued, he measured production by the line, but measured yield individually.

Supervisor Taylor first declared that production and yield were always determined individually. Then, she asserted, there was a time when the production quota was measured by each line. Later, after the walkout, it changed to an individual quota. Taylor also testified that the 15-box requirement ''started after the walkout,'' in May.

b. *Factual analysis*

Were any employees discharged prior to the walkout for failure to meet production or yield requirements? Respondent argues that they were citing the employee status report to that effect.[10] None of the supervisors who assertedly signed these reports howevertestified, and Plant Manager Polk said that he did not know the circumstances in any of the cases. Watkins and Walker denied that anybody was fired before the walkout for failure to meet production requirements and were corroborated by Supervisor Claudia Taylor. Although Taylor did testify about one warning 5 days before the walkout, there is no evidence of discharge. I conclude that Respondent did not discharge anybody before the walkout for failure to meet production requirements.

I do not credit Polk's assertion that the only change in production requirements was to establish an individual production quota in lieu of a line quota. Supervisor Taylor herself testified that the 15-box requirement was imposed after the walkout.

Respondent next argues that it was during the May 19 meeting that Polk set forth new production and yield requirements.[11] This contention is apparently intended to support the Company's 10(b) defense (the charge was filed on November 29). The argument is contrary to the explicit testimony of Watkins and Walker. There were two employee meetings, the first on May 19 and the second in June. It was during the second meeting that the new production and yield requirements were announced. Polk's testimony does not explicitly rebut this evidence, and I conclude that it was during the June meeting with the deboners that Polk announced the new rules, to wit, that employees would be discharged if they did not produce 15 boxes daily and 56.5 percent in yield.

2. The new absenteeism rule

a. *Summary of the evidence*

Sheila Watkins testified that, prior to the May walkout, there was no specific number of allowed absences. All that the employee had to do was call in that she would not be at work and not be absent more than a ''reasonable'' number of times. Watkins herself was absent 10 times in the 12-month period preceding the walkout but did not receive any

[8] G.C. Exh. 9.
[9] R. Exhs. 13, 14, and 15.
[10] R. Br. 11.
[11] See fn. 10, supra.

discipline. Mattie Walker corroborated Watkins on this issue. Plant Manager Polk, on the other hand, stated that employees absent more than 8 days annually were fired.

There are several ''employee status reports'' in evidence, recording terminations for ''excessive absenteeism.'' None of them mentions the figure ''8.'' Some speculate that the employee simply quit. One of them notes that the employee had ''2'' unexcused absences.[12] It is signed by Supervisor Claudia Taylor who, although she was a witness, did not testify about this exhibit.

The Company agrees that it did change its absenteeism policy. The General Counsel submitted a document which constituted the Company's response to the Board to a prior charge which was later withdrawn.[13] This document is dated November 17, and states that the Company ''changed over to the occurrence system in May . . . immediately after the walkout.'' Under this new system, the document asserts, the prior sick leave policy had been limited to 8 days annually, but was extended to 25 days under the new policy.[14]

Respondent also posted a notice on this subject. The notice is entitled ''attendance and benefits.'' It states that the ''effective date'' was June 1, but there is no stated date of the posting. Watkins testified that she first saw it in August or September. At the bottom of the notice is the handwritten statement:

> Due to confusion and misunderstanding occurrences will be effective [sic] 10/11/93. Everyone will have a clean slate. Everything will count.—NO EXCEPTIONS.[15]

The document sets forth a progressive disciplinary procedure resulting in discharge after five ''occurrences.'' An ''occurrence'' is defined as a 1- to 5-day absence for one cause.[16]

Watkins testified that Plant Manager Polk held a meeting in August or September, at which he discussed the notice. Polk told the employees that they would be fired if they were late or absent too many times. According to Watkins, there were no such rules prior to the walkout.

As noted, Polk contended that there was a prior policy which dictated discharge if the employee was absent more than 8 days annually. Polk also agreed that the Company changed this policy. Asked on direct examination whether it did so with the employees in May, Polk replied that he told them that he would change the rule and let them know.

b. *Factual analysis*

What was the Company's prestrike rule on absenteeism? Although Polk contended that 8 days of absence annually resulted in discharge, there is no documentary evidence to support this testimony. Although there are several employees' status reports indicating discharge for excessive absenteeism, none of them mentions the figure ''8,'' and none of the supervisors testified about these reports, not even Claudia Taylor, who signed two of them[17] and who was a witness.

Set against Respondent's evidence is Sheila Watkins' uncontradicted testimony that she was absent 10 times during the 12 months preceding the walkout without being disciplined. As indicated, Watkins, corroborated by Walker, stated that employees could be absent a reasonable number of times, provided that they called in beforehand.

There is no documentary support for Polk's rigid 8-day rule. Although the Company may have discharged some employees for excessive absenteeism, these may have been ''unreasonable'' absences. I credit Watkins and Walker.

I turn next to the Company's admitted new rule. The Company contends that it went from 8 to 25 allowed days of absence, out of concern for its employees' welfare. The evidence does not support this contention. Although it is true that an employee with five ''occurrences'' of 5-day absences, each for one cause, would have been absent 25 days before reaching termination, an employee with six 1-day absences, or ''occurrences,'' would reach automatic discharge before the asserted but unproved prior limit of eight absences. It is obvious that this rule, coupled with Polk's threat to discharge employees who were absent too many times, had a deleterious effect on the employees' welfare.

Finally, the Company's argument that it promulgated the new rule in May is without merit.[18] Polk did not so contend. Although the Company argues that this timing is evidenced by its statement to the Board, statements of position do not constitute evidence. Moreover, the statement of position is contradicted by the posting, which gives the effective date as June 1. The Company's argument is further compromised by the written legend on the posting, giving still another date, October 11, as the effective date.

I conclude that Respondent announced a new absenteeism policy in mid to late 1992, and that it was adverse to its employees' interests.

3. The alleged change in vacation pay

a. *Summary of the evidence*

Respondent had both hourly rates of pay and production rates. The hourly rates were utilized when an employee was in training. Watkins was paid an hourly rate for 3 months after being hired. With respect to the production rate, Watkins and Walker agreed that it was based on the amount of meat which the employee obtained from the boxes. Watkins however averred that she did not know what this rate was, because Respondent never explained it to the employees.

Watkins also testified without contradiction that, prior to the strike, she and other employees received 40 hours of pay for 1 week's vacation. In July, after the strike, she received only 32 hours of pay. Watkins further affirmed that, after the strike, in May or June, an employee in the breakroom asked Polk why she wasn't getting 40 hours of vacation pay. Polk replied: ''Why get 40 hours for vacation pay when you are not working 40 hours?'' Mattie Walker testified that a change was made in vacation pay after the walkout.

The posted notice covering absenteeism also had a procedure for computing vacation pay. Employees with 1 year of service received a 1-week vacation, and employees with 5 years received 2 weeks. The amount of vacation pay was cal-

[12] G.C. Exh. 8.

[13] Testimony of Plant Manager Polk and statement by company counsel. R. Exhs. 8, 9.

[14] G.C. Exh. 8.

[15] G.C. Exh. 2.

[16] See fn. 15, supra.

[17] G.C. Exh. 8.

[18] G.C. Exh. 8, R. Br. 6.

culated by the gross pay of the previous year divided by the number of weeks worked.[19]

Respondent introduced a purported proposal to it from the Union dated December 9, in which a 1-year employee's vacation pay would be his ''average'' weekly wage over the preceding year. The legend ''OK 2/10, per Lonnie'' appears in the margin.[20]

b. *Factual analysis*

Respondent argues that Watkins was paid a production rate, not an ''hourly'' rate, and that the General Counsel failed to ''provide the formula'' under which the prestrike ''hourly'' rate was reduced after the strike.[21]

The fact however, that there was a change in the vacation pay is established by the unrebutted testimony of Watkins and Walker. Watkins contended that it was reduced. This contention is buttressed by the fact that Respondent saw fit to include a method of calculating vacation pay in a notice which included other new rules. The General Counsel thus established a prima facie case that there was a change in vacation pay which was adverse to the employees' interests. Respondent was silent in the face of this testimony. I conclude that Respondent did reduce the amount of vacation pay. The exact formula of the reduction can be ascertained in a compliance proceeding. *Future Ambulette*, 293 NLRB 884, 893 (1989).

Although Watkins testified that she overheard the exchange between Polk and another employee, recited above, in ''May or June,'' the change itself was announced in a notice which said that its effective date (the earliest one) was June 1, and Watkins did not see the notice until August or September. The evidence is insufficient to establish that the change was made before June 1, or that employees were put on notice of such change before that date.

Regarding the legend on the asserted union proposal, Polk testified that he bargained with the Union's representatives. There was no testimony about this legend. The parties stipulated that one of the ground rules in bargaining was that a tentative agreement was dependent on the parties reaching an overall agreement.

In the absence of any testimony from Respondent that it reached agreement on this issue, or, that the legend was made by Polk or somebody acting under his direction, I cannot conclude that the document evidences any agreement by the parties. It covers only one issue out of three which are relevant. The stipulation of the parties buttresses this conclusion. Since this document came into being subsequent to February 1993, I conclude that the digits ''2/10'' refer to February 1994, if they mean anything. This was subsequent to the alleged violation.

C. *The Discharge of Carl Fulgham*

1. Summary of the evidence

Fulgham was hired in March 1991. At the time of the strike, he was a support employee for the deboners on the first shift. Fulgham participated in the strike. According to his uncontradicted testimony, Plant Manager Polk said that the employees would be fired if they did not come back to work. Polk however, was only taking back the employees that he needed, and Fulgham did not return until about a month after the strike ended.

The Union published an article about the strike in its Mine Workers Journal. It cited long hours, minimum pay, uncertain quitting time, and unsafe working conditions. Fulgham was quoted in the article as saying that the employees would either make the place better or close it down.[22] The publication was widely distributed to employees in early August, and copies were left in the breakroom, which was frequented by management.

When Fulgham returned, he was assigned to the cleaning crew on the night shift. He asked Plant Manager Polk for his old job on the first shift, but Polk said there were no openings.

Polk was replaced by a new plant manager, Bill Traywick, on August 16. Traywick had been employed elsewhere by the Company, and knew about the walkout. He testified that he had a conversation on August 17 with Fulgham, in which the latter asked why he had to ''break down'' a machine. They ''argued'' about it, but Traywick finally told Fulgham that he would ''work it out.'' This testimony was elicited from Traywick on cross-examination, after his attention was directed to his pretrial affidavit. Fulgham, on the other hand, testified that Traywick told him that he had to break down the deboning machine and clean the stuffing machine. Fulgham agreed that it was his job to perform these functions and denied that he ever argued with Traywick about the matter, or refused to do this work.

Two days later, on August 9, Fulgham and Traywick had another conversation before Fulgham's shift began. It covered two subjects, cleaning the machines, and Fulgham's request for reassignment to the first shift. Fulgham testified that Traywick told him to break down the machines, and that Fulgham agreed to do so without argument. Traywick, on the other hand, contended that Fulgham refused to do so. Traywick agreed that Fulgham's shift had not yet started.

Fulgham then repeated his request, made previously to former Plant Manager Polk, to be reassigned to the first shift. Traywick refused. Fulgham's version of his own response was that he said he would ''talk to some one else.'' ''What did you say?'' Traywick asked, and Fulgham repeated his statement. Traywick testified in similar manner, adding that Fulgham stated, ''by God, he [Traywick] would see it.''

Traywick then went to his office and examined Fulgham's file. He determined that Fulgham had previously been charged with insubordination. Traywick did not make any inquiry about this among other supervisors and could not recall the precise nature of the matter. Fulgham testified that he was charged with insubordination for asking a supervisor why a lunch period had been cut in half.

Fulgham's shift had not yet started. After a visit to a nearby store however, he was directed to Traywick's office. There, according to Fulgham, the plant manager told him that he was fired for ''threatening'' Traywick. Fulgham asked what he had said that Traywick interpreted as a threat, and the latter replied that he ''felt threatened'' when Fulgham said he would see somebody else about the requested reassignment.

[19] G.C. Exh. 2.
[20] R. Exh. 11.
[21] R. Br. 8–9.
[22] G.C. Exh. 13, p. 16.

Traywick contended that he fired Fulgham because he refused to break down the machines, threatened the plant manager, and ''cussed'' him. He also considered Fulgham's prior ''insubordination.'' When asked what he told Fulgham however, Traywick replied that he merely said he was fired. Traywick testified that he called in two witnesses to observe the firing.

2. Factual analysis

There is no evidence that Traywick ever gave ''cussing'' or failure to break down and clean the machines as he reason for the discharge in his final conversation with Fulgham. His two witnesses were not called to testify. I credit Fulgham's testimony, not contradicted by Traywick, that the plant manager told him he was fired for threatening Traywick—by telling him that he, Fulgham, would see somebody else about his requested transfer to the first shift.

Although the issue of whether Fulgham in fact refused to break down and clean the machines is of lesser significance—because of Traywick's failure to state this as a reason during the exit interview—I note that Fulgham was not actually at work when he supposedly refused to obey this order. I credit his denial that he did refuse to do so.

D. *The Discharge of Dorothy Thomas*

1. Summary of the evidence

Dorothy Thomas, the alleged discriminatee, did not testify, and the facts must be gleaned from one document and the uncertain testimony of Supervisor Claudia Taylor.

The document is a letter signed by Respondent's payroll clerk. It states that Thomas was terminated on September 7, 1993, because she was unable to make the yield, and that her last day of pay was September 17.[23]

According to Taylor, Thomas was given 30 days of training on the cone device. Taylor further averred that existing employees were given 30 days to learn the new procedure, but new employees were given 90 days. Employees in training were paid a base rate rather than the production rate.

After the 30 days, according to Taylor, Thomas was given 2 more weeks of training, but never made the yield. She made the 15-box requirement for 1 day, but only ''with help.''[24]

Taylor testified that she made the decision to discharge Thomas because she had been ''told'' to do so if an employee did not make the yield or could not complete 15 boxes.

As indicated above, Taylor testified that employees not making the production requirements were paid a $5 hourly wage and were not discharged. She averred that this started in ''early 1993,'' when they ''changed over to the cone line.'' As set forth above, the Company instituted this procedure in December 1992.

[23] G.C. Exh. 7.

[24] Taylor testified that Thomas had completed her training period on the day she was terminated. On the other hand, Taylor stated in a pretrial affidavit that Thomas was discharged ''when she was unable to make the yield more than 30 days after she had been on the line, although it was before the first day that she was on production for pay purposes.'' At the hearing, Taylor denied stating this to the Board investigator.

2. Factual analysis

On the basis of Respondent's document, I find that Thomas was terminated on September 7.[25] Since she was trained on use of the cone on line 3, for 6 weeks, she came over from line 2, where she had been a hand deboner, in late July.

Neither the yield requirement, cited in Respondent's letter as the reason for Thomas' discharge,[26] nor the yield an 15-box requirements referred to by Taylor, were in effect or enforced prior to the May walkout. Further, at the time of Thomas' discharge, employees who did not meet these requirements were not discharged, but, rather, were paid a $5 hourly rate. There is no evidence that any employee other than Thomas was discharged for failure to meet the requirements.

E. *Legal Analysis and Conclusions*

1. Applicable principles

The General Counsel has the burden of establishing a prima facie case that is sufficient to support the inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the employer to demonstrate that the discipline would have been administered even in the absence of the protected conduct.[27]

2. The changes in rules

I have found that the employees engaged in a strike of 1 week beginning May 11, and that Respondent thereafter made changes in its rules. For the first time, it stated that employees who did not debone 15 boxes daily, and derive 56.5 percent of meat from the boxes, would be discharged. Although Respondent did not implement this rule except in the case of Dorothy Thomas, it took employees who failed to meet the requirements off the production rate and paid them $5 hourly.

Prior to the strike, the employees were allowed a reasonable number of absences, provided that they called in beforehand. After the strike, Respondent posted a rule whereby an employee would automatically be discharged with 6 separate days of absenteeism per year and threatened employees that they would be fired if they were absent too many times.

Prior to the strike, the Company allowed employees 40 hours of vacation pay. After the strike, it implemented a new formula for computing vacation pay which resulted in a reduction in such pay.

The Company advanced no reason for these new rules other than the contention that it gave the employees more ''sick days'' (which I reject). The timing of these changes—all of them subsequent to the strike, and some after the July election—and the absence of any plausible explanation for their implementation, constitute evidence that they were in retaliation for the strike and the employees' overwhelming vote for the Union. There is nothing to indicate that Respondent would have implemented these rules absent the employees' concerted activity.

[25] See fn. 23, supra.

[26] See fn. 25, supra.

[27] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983).

Although the Company introduced evidence purporting to show that the parties reached agreement on a new vacation formula, no final agreement was reached, the asserted agreement took place if at all subsequent to the rule change, and the other two rule changes are not even mentioned.

There is insufficient evidence to establish that any of these changes took place prior to June 1. Accordingly, Respondent's 10(b) defense is without merit.

I conclude Respondent by these actions violated Section 8(a)(3) and (1) of the Act. *EDP Medical Computer Systems*, 284 NLRB 1232, 1266 (1987); *Future Ambulette*, supra.

3. The discharge of Carl Fulgham

Respondent's unlawful changes of rules demonstrate its animus toward the Union. In early August, a union journal published an article about the strike, listing the employees' complaints. Fulgham was quoted in this article as saying that the employees would make the plant better or close it down. The article was widely distributed to employees and copies were left in the breakroom, which was frequented by management. On the basis of this article and the fact that Fulgham was a striker, I conclude that Respondent knew that he was a vocal union supporter. *Jakel Motors*, 288 NLRB 730, 740 (1998), enfd. 875 F.2d 644 (7th Cir. 1989). The Company's animus and the timing of Fulgham's discharge, shortly after appearance of the union publication, establish the General Counsel's prima facie case.

Traywick discharged Fulgham assertedly because he ''threatened'' the plant manager by telling him that he, Fulgham, would see somebody else about Traywick's denial of Fulgham's transfer request. This reasoning has no merit. The Board has held that an employee's statement to a supervisor that he would seek redress for his grievances from the Board did not constitute a threat justifying discharge. *Kay Fries Inc.*, 265 NLRB 1077, 1092 (1982). Fulgham's statement was vague, and did not contain any threat of physical harm to Traywick. I conclude that the asserted reason was pretextual, and that Respondent discharged Fulgham because of his union activity, in violation of Section 8(a)(3) and (1).

4. The discharge of Dorothy Thomas

Thomas was discharged becaus she failed to meet Respondent's new rules, either the new yield requirement, or that plus the 15-box requirement. However, these rules themselves were unlawful, and it is well established that discharge of an employee because of violation of an unlawful rule is itself violative of the Act. *Crestfield Convalescent Home*, 287 NLRB 328 (1987).[28] In *Baptist Memorial Hospital*, 229 NLRB 45 (1977), where an employee was discharged for failure to obey an unlawful rule, the Board found that Section 8(a)(3) and (1) had been violated and ordered reinstatement and backpay. More recently, in *Hyatt Regency Memphis*, 296 NLRB 259 (1989), the Board held that the discharges of employees because they violated the employer's more stringent enforcement of its sign-in/sign-out rule, in retaliation for it employees' selection of the Union, violated Section 8(a)(3) and (1).

The facts in the *Hyatt Regency* case are almost identical with those involving the discharge of Dorothy Thomas. The employees went on strike, selected the union, and the company responded with more stringent and discriminatory rules. Thomas was discharged for violation of one of those rules. On the rationale set forth in the cases cited above, I conclude that this action violated Section 8(a)(3) and (1) of the Act.[29]

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Tuscaloosa Quality Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, International Union, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent committed unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) In retaliation for its employees' union activities, promulgating or more stringently enforcing its rules so as to (1) require employees to debone 15 boxes of meat daily, and derive 56.5 percent of meat from the contents of the boxes; (2) change the rules for absenteeism from one allowing reasonable absences coupled with a call-in requirement, to one mandating discharge in circumstances which could include only 6 days of absence annually; and (3) change the formula for computing vacation pay so as to reduce the amount to which the employees were entitled.

(b) Discharging employee Carl Fulgham on August 19, 1993, because of his union and other protected activities.

(c) Discharging employee Dorothy Thomas on September 7, 1993, because she violated a rule which Respondent unlawfully promulgated in retaliation for the employees' union activities.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent promulgated or more stringently enforced rules in retaliation for it employees' union activities, it will be recommended that it rescind its more stringent enforcement of its rules relating to production and yield, its disciplinary steps relating to absenteeism, and its new formula for calculating the amount of vacation pay due its employees. I shall also recommend that Respond-

[28] See also *Mesa Vista Hospital*, 280 NLRB 298 (1986); *Presbyterian/St. Luke's Medical Center*, 258 NLRB 93, 99 (1981), enfd. 723 F.2d 1468 (10th Cir. 1983); *Times Publishing Co.*, 231 NLRB 207, 208 (1977).

[29] Thomas was the only employee discharged for violation of the new production rules. It is obvious that other employees also violated the rules, since Supervisor Taylor testified that those employees who did not meet the production requirements were not fired but paid $5 hourly. This establishes that the discharge of Thomas was a disparate application of Respondent's new production rule. Although this constitutes additional evidence of discriminatory motivation, I need not rely on it in light of the rationale set forth above.

ent be ordered to reimburse employees for any vacation pay which it unlawfully withheld from them, with interest.

It having been found that Respondent unlawfully discharged employee Carl Fulgham on August 19, 1993, and employee Dorothy Thomas on September 7, 1993, it is recommended that Respondent be ordered to offer them reinstatement to their former positions, without prejudice to their seniority or other rights and privileges, or, if any such position does not exist, to a substantially equivalent position, dismissing, if necessary, any employee hired to fill the position, and to make them whole for any loss of earnings they may have suffered by reason of Respondent's unlawful conduct by paying each of them a sum of money equal to the amount he or she would have earned from the date of his or her unlawful discharge to the date of an offer of reinstatement less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[30]

I shall also recommend the posting of notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Tuscaloosa Quality Foods, Inc., Tuscaloosa, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Formulating and enforcing a rule requiring its employees to debone 15 boxes of meat daily and derive 56.5 percent of meat from the contents of the boxes.

(b) Formulating and enforcing a rule on absenteeism more stringent than its prior rule of allowing a reasonable number of absences coupled with a requirement that the employee call in prior to the scheduled worktime.

(c) Applying a formula for calculating its employees' vacation pay so as to reduce the pay.

(d) Discouraging membership in International Union, United Mine Workers of America, or any other labor organization, by changing its rules or discharging employees in retaliation for their union activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its formulation of or more stringent enforcement of the rules described in paragraphs 1(a), (b), and (c) above.

(b) Offer Carl Fulgham and Dorothy Thomas reinstatement to their former positions or, if any such position no longer exists, to a substantially equivalent position, dismissing, if necessary, any employee hired to fill the position, and make each of them whole for any loss of earnings either may have suffered by reason of Respondent's unlawful discharges of them, in the manner described in the remedy section of this decision.

(c) Reimburse employees, with interest, for any vacation pay which it unlawfully withheld from them.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, employee transfer records, jobsite rosters and all other records necessary to analyze the amount of backpay and other reimbursements due under the terms of this Order.

(e) Post at its facilities at Tuscaloosa, Alabama, copies of the attached notice marked ''Appendix.''[32] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 10 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[30] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''